BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF JAMES M. and MARY JANE NAPIER and RICHARD L. and DANA SHERMAN, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and JAY RICHARD LIAN, Respondents.	PCHB Nos. 84-299 and 84-303 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter involves separate Notices of Appeal taken by appellant James M. and Mary Jane Napier (under PCHB No. 84-299) and Richard L. and Dana Sherman (under PCHB No. 84-303) to the issuance of Surface Water Permit, Application No. S2-26461, to Jay Richard Lian, by Department of Ecology. T' issues and the subject matter of both Notices of Appeal are the same. It further appeared that a consolidation of the Notices of Appeal would expedite their disposition, avoid duplication of testimony and not prejudice the

rights of the parties. Accordingly, these cases were consolidated for hearing.

This matter came on before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford, on February 8, 1985, Lacey. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Lisa Flechtner officially reported the proceedings.

Appellants represented themselves. Respondent Department of Ecology (DOE) was represented by Assistant Attorney General Allen T. Miller, Jr. Permittee Jay Richard Lian represented himself.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

On December 15, 1983, respondent Lian filed with the Department of Ecology a Surface Water Application No. S2-26461. On March 26, 1984, appellant Napier filed Surface Water Application No. S2-26505. On April 16, 1984, appellant Sherman filed Surface Water Application No. S2-26522. Withdrawals of water for all applications are proposed to be from an unnamed spring which is a tributary to Ward Creek in Pacific County.

II

Each of the three parties in this case requested 0.02 cubic feet per second (9 gallons per minute) for domestic use on a continuous basis.

III

Historically, the spring in question has supplied domestic water for the three homes now occupied by the Lians, Napiers and Shermans. All such use has been without benefit of permission issued pursuant to the Water Code of 1917. No competent evidence pinpoints the inception of usage. There is no evidence that any user of the source filed a claim pursuant to the water rights claims registration statute, chapter 90.14 RCW.

IV

A delivery system from the spring has evolved over time. At present, outflow from the spring is collected in several 55 gallon drums. From these drums, a line leads down gradient to a 1,000 gallon storage tank. From this tank, lines lead to the Sherman's and Napier's houses. The overflow from the 55 gallon drums and any spring waters not captured in these drums flow a natural depression to a storage pond and a sunken concrete cistern (open at the bottom to allow infiltration). Water is pumped from the cistern to the Lian's house.

V

The spring itself is on lands belonging to Weyerhaeuser Company. Appellants Sherman and Napier have secured permission from the Company for a pipeline across its land. The Lians have no right of way problem, because the water that escapes the collection system at the spring arrives by gravity at their doorstep.

VI

There is no evidence that any domestic water supply system serving the public is available to these rural families. Ward Creek is brackish and subject to tidal influence as it passes the Lian, Napier and Sherman homes.

VII

The outflow of the spring does not form a continuous watercourse in which any fish resources or other instream values have been identified.

VIII

On April 23, 1984, a representative of DOE traveled to the site and performed a field investigation. The inspector discussed respondent Lian's application with Mr. Lian's family and with appellant Napier. The flow from the collection system at the spring measured 2.5 gallons per minute on this day.

IX

On August 22, 1984, the DOE performed another field investigation. The DOE inspector discussed the applications with Mr. Sherman, Mr. Napier and Mr. Lian. The flow from the collection system at the spring measured 2.0 gallons per minute on this day.

X

On September 17, 1984, the Department issued three Reports of Examination recommending that each party receive a permit for 0.01 cubic feet per second (4.5 gallons per minute) as a maximum instantaneous withdrawal rate, limited to a quantity of one acre-foot

per year.

XI

Each report contained the investigator's conclusion that adequate water for domestic service to three households is not available without the development of additional storage capacity. In testimony, DOE's investigator stated that 800-900 gallons per day per family is necessary for an adequate supply.

The present collection system at the spring does not capture the entire outflow. However, only two gallons per minute on a continuous basis would generate 2,880 gallons per day, enough for the three households even under low flow conditions.

DOE's investigator concluded that with improved storage, enough water could be made available to accommodate the potential uses and users.

XII

DOE's regional resource management supervisor testified that he believed the most workable approach would be to build one efficient collection system with three outflow pipes all at the same elevation, each leading to an individual storage tank on each lot. This would give all users an equal share of the available supply in a manner which is essentially self-regulating.

XIII

The three parties have not been able to agree to develop a system jointly. The Lians have refused to join in any common project because of concerns about expense.

XIV

Appellants Napier feeling aggrieved by the recommendation in the report on the Lian application filed an appeal with this Board on October 26, 1984. Appellants Sherman also feeling aggrieved by the Lian report filed an appeal with this Board on October 29, 1984.

The appellants object to the Lians' receiving the first priority for water from the spring. They also assert that there is not, in fact, enough water available to supply all three homes. Under the circumstances, they believe that the Lians' share should not be the lion's share.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. RCW 43.21B.

II

Under RCW 90.03.290, DOE must make four determinations prior to the issuance of a permit to appropriate: (1) what water, if any, is available; (2) to what beneficial uses is the water to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare. Stempel v. Board of Water Resources, 82 Wn. 2nd, 109, 115, 508 P.2d 166 (1977).

In the instant case, there is no question of beneficial use. Domestic use is unquestionably beneficial. RCW 90.54.020(1). There is also no question as to impairment of existing rights. In the absence of evidence both of the early-day use and of any registration of claims, any rights which come into existence on this source must be acquired pursuant to the statutory procedure of the Water Code of 1917. Department of Ecology v. Abbott, 104 Wn 2d 686, ___ P. 2d ___, (1985); Department of Ecology v. Adsit, 103 Wn 2d 698, ___ P. 2d ___, (1985). To date no statutory permits, leading to such rights, have been issued. Thus, the water availability and public interest criteria are the focus of this case.

III

Specific standards, such as water availability, are, of course, just examples of the encompassing public interest criterion. More definite content is given to this broad term by provisions of the Water Resources Act of 1971 and by policy language within the Water Code itself. Particularly relevant here are the provisions of RCW 90.54.020(2) and RCW 90.03.005.

The former requires that the allocation of water among potential uses and users be based on securing the "maximum net benefits for the people of the state." The latter also sets forth a policy for obtaining "maximum net benefits" and enjoins DOE to reduce wasteful practices in the exercise of rights to the "maximum extent practicable."

These modern enactments flesh out the language of the 1917 Code

which commands the state permit authority to pay "due regard to the highest feasible development of the use of waters belonging to the public." RCW 90.03.290.

The net effect is the legislative expression of a policy that individual applications not be considered in isolation, but rather in the context of competing demands for the resource.

IV

Where, as here, there are several applications for use of water from the same source pending simultaneously, the appropriate thing is to consider them together, in light of the policies for maximizing benefits, preventing waste and fully using the resource.[1] This is, in effect, what DOE has done in this case.

V

Where, as here, there are no identified instream values to protect and the competing applications are all for the same amount and type of use, there is no basis upon which to prefer allocation to one use or user over another.

Under the circumstances of this case, the maximization policies of the law are served by alloting the supply equally to the several applicants. This is particularly appropriate in this instance because the uses are in existence and have been going on for some time and the

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1. While a permit applicant's place in line may be an "existing right" in some sense, Schuh v. Department of Ecology, 100 Wn 2d 180, 187, 667 P. 2d 64 (1983), it is clearly not a right such as to prevent evaluating an application in light of other potential uses and users. See, e.g., Tanner v. Bacon, 103 Utah 494, 136 P. 2d 957 (1943).

only thing that differentiates the parties is that one managed to get his application in slightly ahead of the others.

VI

The DOE has attempted to divide the supply into three equal parts, but has acknowledged that additional storage is necessary in order for enough water to be available for the beneficial use of all. Inherent in this conclusion is the proposition that water is not "available for appropriation" for any of these applicants unless that applicant contributes his share to the development of additional storage.

This applies to the Lians as well as to the Napiers and Shermans. No reason in law, logic or fairness commands that the Lians be free of a condition respecting adding to the storage necessary to make adequate water available to,all members of the applicant pool before the DOE. Indeed, if the Lians' permit is not so conditioned, "the tenet of water law which precludes wasteful practices" might well be violated. See RCW 90.03.005.

VII

It is not clear from the Report of Examination how the DOE intends to condition the Lian's permit, given the expressed need for additional storage.[2]

If DOE intends to include a condition such as the following, its decision should be sustained:

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2. There can be no question of DOE's power to condition the Lian's permit, consistent with the policies of the statutes, since DOE has the discretionary power to deny a permit altogether. See State v. Crown Zellerbach, 92 Wn.2d 894, 602 P.2d 1172 (1979); and Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).

> This permit is issued subject to the permittees' being required to furnish or contribute his proportionate share to additional storage in the system in order for the available supply to be adequate for three households. Unless proof of such action is made during the develoment period for this permit, no certificate of water right shall issue.

If DOE does not so intend, its decision should be reversed on the grounds that water is not "available" for appropriation and that granting the permit "threatens to prove detrimental to the public interest." RCW 90.03.290.

VIII

The Lians' priority position, as the first applicant, is established by statute, RCW 90.03.340. If and when they perfect their right by complying with the conditions of their permit, their priority date will be December 15, 1983.

If there were ever a shortage so severe that all three households could not obtain the full amount of their rights, DOE (or any court applied to) would be faced with a question of enforcement discretion, recognizing both the priority principle and the equities of the situation. However considering the prerequisite for development of additional storage, the application of the priority principle in an enforcement context appears to be a highly theoretical possibility.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

DOE's decision on Surface Water Application S2-26461 is remanded to the Department for action consistent with this Opinion.

DONE this 3rd day of April, 1985.

POLLUTION CONROL HEARINGS BOARD

4/2/85

LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Lawyer Member

GAYLE ROTHROCK, Vice Chairman